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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

JASON KIM,

Plaintiff,

v.

THE GUARDIAN LIFE INSURANCE  
COMPANY OF AMERICA, and DOES  
1 through 10,

Defendant.

Case No. 8:23-cv-01579-DOC-ADSx  
(Honorable David O. Carter,  
Crtrm: 10A, Santa Ana)

**DEFENDANT'S OPENING TRIAL  
BRIEF**

Trial: April 15, 2024  
Time: 8:30 a.m.  
Crtrm: 10A, Santa Ana

Complaint Filed: August 23, 2023

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1 **I. INTRODUCTION**

2 This is an ERISA-governed dispute concerning the applicability of a pre-  
3 existing condition exclusion to bar a claim for long-term disability (“LTD”) benefits.  
4 It is a unique case in which the claimant’s own doctors agree with the plan  
5 administrator’s conclusions. The only source of disagreement is the claimant  
6 himself, who urges the Court to eschew the opinions of all doctors who have treated  
7 him or who have reviewed his claim and instead to accept his own lay opinion as to  
8 the cause of his alleged disability. The applicable standard of review is *de novo*.

9 The plan under which Plaintiff Jason Kim (“Kim”) was covered  
10 conspicuously provides that it does not cover a disability that begins in the first 12  
11 months of Kim’s coverage if it was “caused or substantially contributed to by a pre-  
12 existing condition or medical or surgical treatment of a pre-existing condition.” A  
13 “pre-existing condition” is defined as one (i) for which Kim received medical  
14 treatment, care, services, or advice, or (ii) for which Kim took prescribed  
15 medication, or (iii) which caused symptoms, within the three months immediately  
16 prior to the effective date of Kim’s coverage. Under well-settled Ninth Circuit law,  
17 such a provision bars coverage where a pre-existing condition ***substantially***  
18 ***contributes*** to a disability, *even if another condition is shown to be a “predominant”*  
19 *or “proximate” cause of the disability.*

20 It is uncontroverted that Kim had a pre-existing condition as defined by the  
21 plan. Kim admits that he “suffered from depression, anxiety, and attention deficit  
22 hyperactivity disorder” prior to becoming covered under the plan [Complaint, ¶10],  
23 and he indisputably took prescribed Lexapro and Adderall for these conditions  
24 during the three months immediately preceding the May 1, 2020 effective date of  
25 his coverage. After becoming covered, Kim continued to see various doctors for  
26 myriad complaints including depression, anxiety, and poor sleep. His depression  
27 progressed to the point that, on November 30, 2020, Kim scheduled a psychiatry  
28 consultation to discuss undergoing a multi-session course of transcranial magnetic

1 stimulation (“TMS”), which applies powerful magnetic fields to the brain to treat  
2 severe depression. Kim saw his psychiatrist for his worsening depression again on  
3 January 4, 2021.

4 On January 19, 2021, Kim complained of intense anxiety, “dark thoughts,”  
5 and insomnia. He was prescribed Zyprexa, anti-psychotic medication used to treat  
6 depression and anxiety. In the ensuing months, Kim continued to suffer from  
7 significant depression and anxiety symptoms. He was hospitalized involuntarily for  
8 suicidal ideation, and later required an emergency room visit for a “suicidal”  
9 overdose of Zyprexa. On March 25, 2021, Kim’s neurologist diagnosed him with  
10 tardive dyskinesia and tardive akathisia, which she opined were *caused by Zyprexa*.<sup>1</sup>  
11 Kim subsequently saw at least *three other doctors* who similarly opined that his  
12 movement disorders were caused by his Zyprexa use.

13 Kim claims to be disabled as of March 25, 2021 (within 12 months after  
14 becoming covered) due to tardive dyskinesia and tardive akathisia. All of Kim’s  
15 treating physicians—and Guardian’s independent physician consultants—agree that  
16 these conditions were caused by Zyprexa, which Kim took to treat his pre-existing  
17 condition. Indeed, it is no coincidence that, after Kim discontinued Zyprexa, his  
18 conditions eventually improved to the point that he was able to return to work. Still,  
19 Kim inexplicably insists that his allegedly disabling conditions were caused by a  
20 brief COVID-19 bout in January 2021. *No doctor has endorsed this theory, which*  
21 *finds no medical support whatsoever.* To the contrary, Kim had a “normal,”  
22 complication-free course of COVID-19 that did not require any medication or  
23 treatment. An independent infectious disease specialist explicitly rejected Kim’s  
24 and his family’s assertion that his disabling conditions were caused by COVID-19  
25 as lacking any “verifiable evidence.”

26  
27 <sup>1</sup> Tardive dyskinesia is a movement disorder characterized by uncontrollable,  
28 abnormal, and repetitive movements of the face and body. Tardive akathisia is a  
neuropsychiatric syndrome that is associated with psychomotor restlessness. Both  
are well-known side effects of Zyprexa.

1 In sum, the Administrative Record establishes that Kim’s pre-existing  
2 condition and related treatment substantially contributed to his claimed disability.  
3 Guardian accordingly is entitled to judgment in its favor.

## 4 5 **II. FACTUAL BACKGROUND**

### 6 **A. The Plan and Its Relevant Provisions**

7 Moonwell Studios, LLC (“Moonwell”) established, maintained, and  
8 sponsored the Moonwell Studios, LLC OS, LLC Plan (the “Plan”), an ERISA-  
9 governed employee welfare benefit plan. [AR 359] Among other benefits, the Plan  
10 provided LTD benefits to eligible employees through group policy no. G-00571606,  
11 issued to Moonwell by Guardian (the “Policy”). [AR 477] Guardian also acted as  
12 the claims administrator for LTD benefits under the Plan. [AR 300] Kim  
13 participated in the Plan as a benefit of his employment with Moonwell’s subsidiary,  
14 Dreamhaven. [Doc. #1 (Complaint), 2:15-18] Kim became eligible for benefits  
15 under the Plan on May 1, 2020. [AR 1419; Doc. #1, 4:21-22]

16 The Plan defines “total disability,” in pertinent part, as follows:

17 **Total Disability or Totally Disabled** means that as a result of Sickness  
18 or Injury, during the Elimination Period and the Own Occupation  
19 period, You are not able to perform with reasonable continuity the  
20 substantial and material acts necessary to pursue Your Usual  
21 Occupation and You are not working in Your Usual Occupation. After  
22 the end of the Own Occupation period, Total Disability or Totally  
23 Disabled means that as a result of Sickness or Injury You are not able  
24 to engage with reasonable continuity in any occupation in which You  
25 could reasonably be expected to perform satisfactorily in light of Your  
26 age, education, training, experience, station in life, and physical and  
27 mental capacity.

28 [AR 273]



1 More pertinent to this dispute, the Plan excludes coverage for any disability  
2 caused or substantially contributed to by a pre-existing condition:

3 **Pre-Existing Conditions:** You are not covered for a Disability caused  
4 or substantially contributed to by a pre-existing condition or medical or  
5 surgical treatment of a pre-existing condition.

6 You have a pre-existing condition if:

- 7 • You received medical treatment, care or services for a diagnosed  
8 condition or took prescribed medication for a diagnosed  
9 condition in the three months immediately prior to the effective  
10 date of Your insurance under this Certificate; or  
11 You suffered from a physical, or mental condition, whether  
12 diagnosed or was misrepresented or not disclosed in Your  
13 application (i) for which You received a Doctor's advice or  
14 treatment within three months before the effective date of Your  
15 insurance under this Certificate, or (ii) which caused symptoms  
16 within three months before the effective date of Your insurance  
17 under this Certificate for which a prudent person would usually  
18 seek medical advice or treatment; and
- 19 • Disability caused or substantially contributed to by the condition  
20 begins in the first 12 months after the effective date of Your  
21 insurance under this Certificate.

22 No benefits are payable for Disability caused by, contributed to, by, or  
23 resulting from a Pre-Existing Condition; unless the Disability starts  
24 after You complete at least one full day of Active Work after the date  
25 You have been covered under this Certificate for 12 Months in a row.

26 [AR 260-61]

27 There is no dispute that Kim's alleged disability began in the first 12 months  
28 after the effective date of his coverage. [Doc. #1, 4:21-22, 6:5-6] The so-called

1 “lookback period”—the “three months immediately prior to the effective date of  
2 [the] insurance”—is February 1, 2020 to April 30, 2020. [Doc. #1, 4:22-24]

3 **B. Kim’s History of Depression, Anxiety, ADHD, Insomnia, and**  
4 **Other Mental Health Issues and Treatment**

5 Kim’s history of mental health issues and treatment is undisputed and  
6 extensive:

- 7 • July 11, 2018 – During a treatment visit, Kim’s family medicine practitioner,  
8 Jagdeep Kaur Mehrok, M.D., noted that Kim had been taking Adderall since  
9 2014 and fluoxetine (Prozac) for six to seven months. Kim also had taken  
10 Wellbutrin and Celexa for ongoing depression and anxiety, without relief. Dr.  
11 Mehrok diagnosed Kim with ADHD and generalized anxiety disorder and  
12 refilled his prescriptions for Adderall and Prozac. [AR 4964]
- 13 • January 14, 2019 – Kim reported insomnia and anxiety to Dr. Mehrok. Kim  
14 also told Dr. Mehrok that he had treated with a psychiatrist three months  
15 earlier<sup>2</sup> and was prescribed Lexapro<sup>3</sup>, and that he had another follow-up with  
16 the psychiatrist scheduled two weeks later. [AR 5093]
- 17 • July 24, 2019 – Kim emailed Dr. Mehrok to request a testosterone screening  
18 because he was experiencing mental fatigue and brain fog. [AR 5142]
- 19 • November 18, 2019 – During a visit for an unrelated skin issue, Dr. Mehrok  
20 noted an active prescription of 100 Lexapro tablets (with one refill), with  
21 directions to take daily. [AR 2168-69]
- 22 • February 20, 2020 – *During the “lookback period,”* Kim’s physical medicine  
23 doctor, Andrew Merritt, M.D., noted his diagnoses of depression, anxiety, and  
24 ADD [sic]. *Dr. Merritt reviewed Kim’s medications and indicated that Kim*

25  
26 <sup>2</sup> These medical records were not provided to Guardian for review and consequently  
are not part of the Administrative Record.

27 <sup>3</sup> Lexapro, whose generic name is escitalopram, is a medication that is used to treat  
28 depression and anxiety. [AR 2716] See [https://my.clevelandclinic.org/health/  
drugs/18917-escitalopram-tablets](https://my.clevelandclinic.org/health/drugs/18917-escitalopram-tablets).

1        *was taking one tablet of Lexapro 10 mg daily and Adderall 35 mg tablets.*  
2        [AR 4483-84]<sup>4</sup>

3        In the months leading up to his COVID-19 diagnosis, Kim’s depression,  
4        anxiety, insomnia, and related symptoms continued to intensify:

- 5        • September 13, 2020 – Kim asked Dr. Mehrok for a referral to a sleep study  
6        due to his longstanding history of poor sleep. [AR 5189]
- 7        • September 17, 2020 – Robert Lee, D.O. (psychiatrist) referred Kim to Richard  
8        Moldawsky, M.D. (psychiatrist) for consultation and refilled Kim’s Adderall  
9        prescription. [AR 5190]
- 10       • September 23, 2020 – Kim reported to the emergency department at Kaiser  
11       due to intermittent, non-exertional chest pain lasting about 45 minutes at a  
12       time, with associated shortness of breath. Kim had a normal chest workup.  
13       [AR 3284] The attending physician noted Kim’s active diagnoses of  
14       persistent depressive disorder and generalized anxiety disorder. [AR 3288]  
15       Kim also reported confusion, disorientation and difficulty forming words  
16       earlier that day. [AR 5217]
- 17       • November 30, 2020 – Several weeks before he contracted COVID-19, Kim  
18       scheduled a consultation with Dr. Moldawsky, whom he had not seen since  
19       2019, to discuss the possibility of TMS for his “persistent depressive thoughts  
20       and feelings.” Kim also reported that he had stopped taking Lexapro on his  
21       own because he believed it was making his sleep worse. Kim acknowledged  
22       having taken Wellbutrin, Prozac and Celexa in the past. [AR 5194]
- 23       • January 4, 2021 – Six days before his COVID-19 diagnosis, Kim saw Dr.  
24       Moldawsky to discuss to address his recurring passive suicidal ideation and  
25       “longstanding history of anhedonia, chronic depression and a feeling of being  
26       distanced and distant from family and work.” He acknowledged continually

27  
28       <sup>4</sup> Dr. Merritt’s records reflect the same information in connection with subsequent  
visits. [AR 2619, 2622, 2626, 4486, 4490, 4498]

1 taking Adderall for his ADHD. Dr. Moldawsky noted that Kim had taken  
2 fluoxetine, citalopram, bupropion, and escitalopram (Lexapro), and had  
3 undergone a prior course of eye movement desensitization and reprocessing  
4 and some psychotherapy. Since Kim’s anhedonia and related symptoms were  
5 “somewhat less responsive to biological [treatment], but as part of  
6 longstanding depressive disorder, with history of several appropriate drug and  
7 psychotherapy [prescriptions],” Dr. Moldawsky supported a trial of 36 TMS  
8 treatment sessions for Kim. [AR 2238]

9 **C. Kim’s COVID-19 Infection**

10 On January 7, 2021, Kim began experiencing symptoms from COVID-19 and  
11 tested positive three days later, on January 10, 2021. [AR 4904] There is no  
12 evidence in the record that Kim was hospitalized for COVID-19 symptoms or that  
13 he received any medication or other treatment for COVID-19.

14 **D. Kim’s Continued Depression, Anxiety, Insomnia, and Related**  
15 **Treatment**

16 Following his COVID-19 diagnosis, Kim continued to experience an increase  
17 in his pre-existing depression, anxiety, panic, and insomnia, as well as suicidal  
18 ideation. [AR 4898] On January 19, 2021, he called Kaiser and spoke with Wendy  
19 Cohen, M.D. [*Id.*] Kim noted his history of anxiety and panic attacks, and told Dr.  
20 Cohen he was experiencing severe panic attacks<sup>5</sup> as well as suicidal thoughts. [*Id.*]  
21 Dr. Cohen advised him to seek help at the ER. [*Id.*] Later the same day, Kim  
22 emailed Dr. Moldawsky to describe his symptoms:

23 I’m currently struggling through a case of COVID-19 and *I’m having*  
24 *some intense mental symptoms. My anxiety is through the roof* and I  
25 *spend hours a night just pacing through the house trying to wear myself*  
26 *out. ... I’m pretty much paralyzed with panic and some dark thoughts*

27  
28 <sup>5</sup> Panic disorder, which causes panic attacks, is a form of anxiety disorder. See  
<https://my.clevelandclinic.org/health/diseases/4451-panic-attack-panic-disorder>.

1 and they're about to boil over at any given moment. ... (Emphasis  
2 added)

3 [AR 4900] ***Dr. Moldawsky prescribed Zyprexa*** and scheduled a follow-up for the  
4 following day. Dr. Moldawsky spoke with Kim by phone the next day and  
5 documented Kim's reports of *insomnia, intense anxiety, agitation, pacing, feelings*  
6 *of doom and thoughts of self-harm*. [AR 4900-01, 4904] He documented diagnoses  
7 of "major depressive disorder, recurrent episode, severe" and "generalized anxiety  
8 disorder," and recommended "psychiatry follow up." [AR 4904] Kim went on to  
9 experience a brief improvement in his psychiatric condition on Zyprexa and thus  
10 briefly discontinued taking it on his own. [AR 2282, 4928] However, after a  
11 resurgence in his anxiety, Kim resumed taking Zyprexa on February 19, 2021. [AR  
12 4928, 4932]

13 Kim continued to report panic attacks, restlessness, and insomnia. [AR 4934]  
14 On February 26, 2021, he told Dr. Moldawsky that he continued taking Zyprexa and  
15 also was taking melatonin and over-the-counter sleep aids, and drinking alcohol  
16 despite recommendations not to drink alcohol while taking Zyprexa. [AR 4396]

17 On March 20, 2021, Kim was admitted to the hospital for involuntary  
18 detention pursuant to Welfare and Institutions Code section 5150 due to suicidal  
19 ideation, anxiety, insomnia, and panic attacks. [AR 1565-66] He was prescribed  
20 the psychotropic medications Cogentin<sup>6</sup>, Ativan, Desryel (trazodone), Lithium,  
21 Adderall, and Zyprexa while hospitalized. [AR 1566]

22 **E. Kim Is Diagnosed With Tardive Dyskinesia and Tardive**  
23 **Akathisia As a Result of His Psychotropic Medication Use**

24 After his March 20, 2021, hospitalization, Kim began to report physical  
25 symptoms, including rocking movements, constant shaking of his head, staring at  
26 the ceiling, unusual positioning, and uncontrollable facial movements such as

27 <sup>6</sup> Cogentin, whose generic name is benztropine, is a medication that treats symptoms  
28 affecting a person's movement. Its side effects include confusion and memory loss.  
See <https://my.clevelandclinic.org/health/drugs/19171-benztrapine-tablets>.

1 movements of the jaw and puckering of the lips. [AR 1264] On March 25, 2021,  
2 Kim saw Carolyn Neff, M.D., a neurologist, for his ongoing abnormal movements.  
3 [AR 1257] Kim reported that he had experienced some relief of his abnormal  
4 movements with ADHD medication, but that the symptoms returned after that  
5 medication wore off. *Id.* Dr. Neff diagnosed Kim’s involuntary movements as  
6 tardive dyskinesia and tardive akathisia, and ***determined that these conditions had***  
7 ***been caused by Kim’s use of Zyprexa.*** [AR 1268-69] Dr. Neff accordingly  
8 discontinued Zyprexa. *Id.*

9 On April 17, 2021, Kim saw Dr. Linda Soojin Lee in the emergency room and  
10 admitted to having taken 8-12 tablets of Zyprexa in a suicidal gesture. [AR 3475]  
11 Dr. Lee noted impressions of “psychotropic overdose” and “***drug induced acute***  
12 ***akathisia.***” *Id.* (emphasis added).

13 On May 4, 2021, Kim saw Dr. Robert Lee, a psychiatrist, for a second opinion.  
14 [AR 2427] *Kim told Dr. Lee that he was prescribed Zyprexa to manage his*  
15 *increased agitation and anxiety following his COVID-19 diagnosis, but then began*  
16 *to experience akathisia as a side effect.* *Id.* Kim reported that after stopping  
17 Zyprexa, he started Cogentin, which in turn purportedly caused him confusion,  
18 memory problems, and further movement issues. [*Id.*] At the time, Kim reported  
19 improvement in his akathisia as more time passed since his last use of Zyprexa, but  
20 continuing depression and anxiety. [AR 2427, 2431] Kim was taking lithium and  
21 Depakote due to his recent suicidal ideation and concerns about bipolar disorder.  
22 [*Id.*] Dr. Lee diagnosed Kim with *ADHD, generalized anxiety disorder, and drug-*  
23 ***induced akathisia.*** [AR 2431-32]

24 In May 2021, Kim underwent a neuropsychological evaluation with Priscilla  
25 Armstrong, Ph.D. [AR 2564-76] Dr. Armstrong concluded that Kim demonstrated  
26 a “variable” neuropsychological profile. [AR 2575] He scored in the average or  
27 high-average range on multiple tests (including intelligence, verbal skills, executive  
28 functioning, and some memory tests), and in the below-average or impaired range



1 on certain memory tests. [AR 2573, 2575] Dr. Armstrong opined that Kim met the  
2 criteria for “mild neurocognitive disorder.” [AR 2575] Dr. Armstrong did not opine  
3 as to the cause of Kim’s mild neurocognitive difficulties or comment on whether  
4 they represented a decline relative to Kim’s prior abilities. [AR 2564-76]

5 Also in May 2021, Kim began seeing Kenneth Martinez, M.D., a neurologist  
6 specializing in movement disorders. [AR 2598] *Kim reported an improvement in*  
7 *his symptoms since discontinuing Zyprexa. Id. Dr. Martinez agreed with Dr. Neff’s*  
8 *diagnoses of tardive dyskinesia and tardive akathisia and concluded that they were*  
9 *“secondary to Zyprexa use.”* [AR 2600] He advised Kim that his symptoms would  
10 resolve between three months and one year after his discontinuation of Zyprexa.  
11 [*Id.*]

12 **F. Guardian Denies Kim’s Claim for LTD Benefits Based on the Pre-**  
13 **Existing Condition Exclusion**

14 In June 2021, Kim submitted a claim to Guardian for LTD benefits, claiming  
15 to be disabled as of March 25, 2021 from his occupation as a video game art director.  
16 [AR 628, 1489]<sup>7</sup> Because Kim had been covered under the Plan for less than 12  
17 months at the time his claimed disability began, Guardian reviewed his claim for  
18 pre-existing conditions during the Plan’s three-month “lookback period” of February  
19 1, 2020 to April 30, 2020. [AR 1419] Guardian requested and received medical  
20 records from Kim’s healthcare providers, which revealed the extensive pre-existing  
21 conditions and treatment summarized above. [AR 2106, 2546, 2548, 2550]

22 Kim submitted an Attending Physician Statement (“APS”) from Dr. Martinez  
23 stating that he was totally disabled due to tardive dyskinesia and tardive akathisia.  
24 [AR 2694] Kim also submitted an APS from Dr. Robert Lee stating that he was  
25 impaired due to “generalized anxiety disorder, movement disorder, major depressive  
26 disorder, neuroleptic induced akathisia, [and] cognitive disorder.” [AR 1379]

27 <sup>7</sup> Guardian approved and paid Kim’s claim for Short-Term Disability benefits under  
28 the Plan, for the maximum period of March 22, 2021 to June 23, 2021. [AR 518,  
520]

1 In July 2021, Guardian conducted an interview with Kim and his wife. [AR  
2 1968-1971] Kim reported that his psychiatrist had advised him that his symptoms  
3 likely were a manic episode related to his pre-existing depression and anxiety,  
4 though Kim believed they were caused by COVID-19. [AR 1968] Kim told  
5 Guardian that he was prescribed Zyprexa, and a few days later reportedly began to  
6 experience panic, insomnia, and continued manic behavior. *Id.* He stated that he  
7 visited the emergency room, where the physicians again told him he was  
8 experiencing anxiety. [AR 1969] He reportedly was placed on benztropine  
9 (Cogentin), but discontinued it after experiencing memory loss and cognitive delays.  
10 *Id.* Kim reported that he began to experience involuntary facial and body  
11 movements due to medication use. [AR 1969-70] Kim stated his psychiatrist again  
12 told him that these symptoms were related to his anxiety and depression, with which  
13 he had been diagnosed since his twenties. [AR 1970] Still, Kim continued to believe  
14 that his symptoms were caused by COVID-19. *Id.* After further adjustments to his  
15 medications, Kim's condition eventually stabilized in April 2021. [AR 1970-71]

16 Guardian's Registered Nurse Case Manager, Gloria Polsinelli, reviewed  
17 Kim's medical records and concluded that his movement and cognitive issues were  
18 directly related to Kim's behavioral health disorders and to side effects of treatment  
19 for those disorders, and were not due to COVID-19. [AR 576] Polsinelli also opined  
20 that Kim's mild cognitive findings would not preclude him from working. [*Id.*]  
21 Polsinelli recommended referral for review by Guardian's Behavioral Health Case  
22 Manager. [AR 577]

23 Robbin Holley, Guardian's Behavioral Health Case Manager, in turn  
24 reviewed Kim's medical records. [AR 553-63] Holley noted several points  
25 regarding Kim's medical history and treatment:

- 26 • Kim psychiatrist, Dr. Moldawsky, opined that Kim's continued anxiety and  
27 panic attacks in March 2021 were primarily caused by his psychiatric  
28



1 conditions, as his depression and anxiety scores had remained consistently  
2 high. [AR 558]

- 3 • After his involuntary hold discharge on March 24, 2021, Kim reportedly  
4 developed “neuroleptic [P]arkinson’s [due to] his Zyprexa.” [AR 557]
- 5 • Dr. Robert Lee commented that Kim’s tardive dyskinesia and tardive  
6 akathisia were worsened by stress and anxiety. [AR 560]
- 7 • Kim’s variable neuropsychological testing scores with Dr. Armstrong could  
8 be “natural,” as Kim had a history of reading comprehension issues as a child  
9 in school. [AR 562]
- 10 • Kim’s conditions were primarily psychiatric in nature, consistent with the  
11 viewpoint of Kim’s providers, including Dr. Moldawsky. [AR 561]

12 On August 18, 2021, Guardian denied Kim’s LTD claim based on the  
13 conclusion that his claimed disability was caused or contributed to by his pre-  
14 existing psychiatric conditions or by medical treatment for those conditions. [AR  
15 2714-21]

16 **G. Guardian Affirms Its Denial on Appeal Based on Reviews from**  
17 **Three Independent, Board-Certified Physicians**

18 On February 7, 2022, Kim appealed the claim decision through his counsel of  
19 record. [AR 3207-3220] Kim submitted additional medical records and letters of  
20 purported support from Dr. Martinez [AR 3275] and Dr. Lee [AR 3270]. Dr.  
21 Martinez vehemently asserted that Kim was disabled due to tardive dyskinesia and  
22 tardive akathisia (a point that was not disputed in Guardian’s denial letter). [AR  
23 3274-75, 5447] But he confirmed the causal link between Kim’s allegedly disabling  
24 condition and his antipsychotic medication use:

25 Tardive dyskinesia (TD) is a medication-induced hyperkinetic  
26 movement disorder and tardive akathisia (TA) is a medication-induced  
27 movement disorder manifested by repetitive tapping, squirming, and  
28 marching movements. *Both disorders are solely caused by the use of*

1 *dopamine receptor-blocking agents, including the antipsychotic drug*  
2 *Zyprexa.* ... TD and TA can be irreversible and lifelong. (Emphasis  
3 added.)

4 [AR 3274]

5 Dr. Lee concurred: “It is unclear at this time as to what has caused these  
6 [movement and cognitive slowing] problems but *likely a side effect to a trial of*  
7 *medication for mental health is implicated.*” (Emphasis added.) [AR 3270]

8 Kim also submitted statements from his family members and friends, which  
9 largely attested to the disabling nature of Kim’s tardive dyskinesia and tardive  
10 akathisia (which, again, Guardian did not dispute in its denial). [AR 3253, 3255,  
11 3273, 3276, 3909, 3910] Kim did not submit any medical evidence causally linking  
12 Kim’s COVID-19 infection to his tardive dyskinesia and/or tardive akathisia.

13 Guardian referred Kim’s appeal for peer review by three board-certified  
14 physicians. Dr. Arnold Lentnek, board-certified in internal medicine and infection  
15 disease, opined that COVID-19 was not a contributing factor to Kim’s claimed  
16 disability. [AR 5406-10] Dr. Lentnek also specifically rebuffed any connection  
17 between Kim’s Zyprexa treatment and his COVID-19 infection:

18 *Medical information does not support functional impairment from an*  
19 *infectious disease standpoint.* As discussed above, the claimant had a  
20 positive COVID-19 test in January 2021. Some symptoms of fever,  
21 chills, and similar, were noted, however, *the claimant’s course has been*  
22 *normal and without any severe issues.* There were no reports of  
23 shortness of breath or dyspnea. The claimant’s condition did not  
24 necessitate hospitalization. *There was no treatment specifically for*  
25 *COVID-19 started. Although the claimant’s attorney indicates in the*  
26 *2/7/22 letter that Olanzapine [Zyprexa] was started due to COVID-19,*  
27 *this is not so, as evidently, per the 1/20/21 report, Olanzapine*  
28 *[Zyprexa] was started for the claimant’s severe anxiety and panic*

1 *state after he had a positive COVID-19 test.* Since March 2021 the  
2 claimant reported symptoms described as long-haul COVID-19. He  
3 reported cognitive difficulties, slow thinking, and brain fog. *Attending*  
4 *physicians noted that a psychiatric etiology to these cognitive issues*  
5 *was a more salient factor, but the claimant and his wife are convinced*  
6 *that these issues are due to COVID-19. Medical information does not*  
7 *provide verifiable evidence of this. The claimant's COVID-19 course*  
8 *has been light and not complicated, and this does not correspond to*  
9 *sudden onset of severe issues two months later.* Medical information  
10 also notes improvement of the symptoms with use of psychiatric  
11 medications. *Medical information does not otherwise support any*  
12 *functional impairment due to COVID-19 or due to any other*  
13 *infectious disease.* ... (Emphasis added.)

14 [AR 5409]

15 Dr. Leon Meytin, board-certified in neurology, attempted to speak with Kim's  
16 neurologists, Drs. Neff and Martinez, but his calls were not returned. [AR 5416]  
17 Nevertheless, he was in agreement regarding the causal connection between Kim's  
18 psychiatric treatment and his allegedly disabling condition:

19 The claimant was started on Zyprexa on 1/20/2021 for severe anxiety,  
20 depression, and suicidal ideation. ... When started on Zyprexa in  
21 January 2021, it appears that the claimant developed akathisia and  
22 possibly tardive dyskinesia. Zyprexa was stopped and symptoms  
23 seemed to improve, although it is unclear if they fully resolved.

24 [AR 5415]

25 Dr. Elbert Greer Richardson, board-certified in psychiatry, called Dr.  
26 Moldawsky but was told that Dr. Moldawsky would not comment on any restrictions  
27 or limitations without reevaluating Kim. [AR 5378] Dr. Richardson spoke with Dr.  
28 Robert Lee, who advised that he had no contact with Kim during the period in

1 review. [*Id.*] Dr. Richardson’s calls to Drs. Neff and Martinez were not returned.  
2 [*Id.*] Dr. Richardson concluded that Kim was disabled due to his pre-existing  
3 psychiatric conditions from March 25, 2021 to July 4, 2021. [AR 5380] With  
4 respect to Kim’s tardive dyskinesia and tardive akathisia diagnoses, Dr. Richardson  
5 noted that they followed his Zyprexa treatment. [AR 5381]

6 Guardian provided the above peer-review reports to Kim’s counsel for review  
7 and response. [AR 5427] Kim returned a letter from Dr. Martinez disagreeing with  
8 Dr. Meytin’s prior statement that Kim’s neurological conditions were not disabling.  
9 [AR 5447] In response, Dr. Meytin stood by his statement but suggested that an  
10 independent medical examination could help to resolve any discrepancy regarding  
11 Kim’s “possible restrictions.” [AR 5456]<sup>8</sup>

12 By letter of September 30, 2022, Guardian upheld its denial of the claim based  
13 on the Plan’s pre-existing condition exclusion. [AR 5462-67]

#### 14 **H. Kim Returns to Work**

15 In mid-2022, “after his TD [tardive dyskinesia] and TA [tardive akathisia]  
16 were properly treated,” Kim “was able to return to work.” [Doc. #1, 16:23-27]

### 18 **III. GUARDIAN CORRECTLY DETERMINED THAT LTD BENEFITS** 19 **ARE NOT PAYABLE DUE TO THE PLAN’S PRE-EXISTING** 20 **CONDITION EXCLUSION**

#### 21 **A. The *De Novo* Standard of Review**

22 The *de novo* standard applies to this Court’s determination of whether Kim is  
23 entitled to benefits under the terms of the Plan. Under that standard, the Court  
24 “determines in the first instance if the claimant has adequately established that he or  
25 she is disabled under the terms of the plan.” *Muniz v. Amec Constr. Mgmt., Inc.*, 623

26 \_\_\_\_\_  
27 <sup>8</sup> Dr. Martinez and Dr. Meytin’s exchange regarding Kim’s restrictions and  
28 limitations, and the suggestion of an IME to resolve that conflict, are not germane to  
the issues in this action because Guardian denied the claim based on the pre-existing  
condition exclusion, not based on a determination that Kim was not disabled.

1 F.3d 1290, 1295-1296 (9th Cir. 2010). The Court is to “evaluate the persuasiveness  
2 of conflicting testimony and decide which is more likely true.” *Kearney v. Standard*  
3 *Ins. Co.*, 175 F.3d 1084, 1095 (9th Cir. 1999) (en banc). Applying this standard,  
4 Guardian correctly determined that Kim is not entitled to LTD benefits under the  
5 Plan because his claimed disability was caused or substantially contributed to by a  
6 pre-existing condition or medical treatment of a pre-existing condition.

7 **B. The Plan’s Pre-Existing Condition Exclusion Is Enforceable**

8 Under ERISA, “[a] pre-existing condition exclusion is valid, and bars  
9 recovery, if: (1) the provision is conspicuous; and (2) the pre-existing condition  
10 substantially contributed to the disability.” *Wilkerson v. Riffage.com Disability*  
11 *Income Prot. Pgm.*, 303 Fed.Appx. 408, 409 (9th Cir. 2008) (citing *McClure v. Life*  
12 *Ins. Co. of N. Am.*, 84 F.3d 1129, 1135 (9th Cir. 1996)).

13 Addressing the first prong, the pre-existing condition exclusion here is  
14 undeniably conspicuous. It appears in the “Long Term Disability Income Coverage”  
15 portion of the Plan, in a section prominently titled, “**Limitations And Exclusions.**”  
16 (Emphasis in original.) [AR 259-61] The provision is separated by spaces from  
17 other provisions and is preceded by the words, “**Pre-Existing Conditions,**” in bold  
18 font. [AR 260]<sup>9</sup> Its text is set out in the same font style and size as virtually all other  
19 text in the Plan, including the provisions that define “Total Disability” and otherwise  
20 establish the circumstances in which the Plan would provide coverage. [See, e.g.,  
21 AR 260-61, 273]

22 The pre-existing condition provision’s text is clearly and simply phrased. It  
23 begins by plainly stating: “You are not covered for a Disability caused or  
24 substantially contributed to by a pre-existing condition or medical or surgical  
25 treatment of a pre-existing condition.” [AR 260] The provision then continues with  
26 the words “You have a pre-existing condition if,” and delineates the circumstances

27  
28 <sup>9</sup> The “**Limitations And Exclusions**” section of the Plan’s “Long Term Disability  
Income Coverage” is clearly identified in the Plan’s table of contents. [AR 243]

1 in which a pre-existing condition would be found. [AR 260-61] It goes on to state  
2 that “[n]o benefits are payable for Disability caused by, contributed to by, or  
3 resulting from a Pre-Existing Condition” if that disability starts within the first 12  
4 months after the effective date of Kim’s coverage. [AR 261]

5 In short, the Plan’s pre-existing condition exclusion is enforceable.

6 **C. The Plan’s Pre-Existing Condition Exclusion Bars Any Recovery**  
7 **By Kim Because His Pre-Existing Depression, Anxiety, and**  
8 **Related Conditions and Treatment Caused or Substantially**  
9 **Contributed to His Claimed Disability**

10 In the Ninth Circuit, “[s]o long as the pre-existing condition substantially  
11 contributed to the disability, the insurer may deny benefits even if a later condition  
12 is shown to be ‘the predominant or proximate cause of the disability.’” *Wilkerson*,  
13 303 Fed.Appx. at 409 (quoting *McClure*, 84 F.3d at 1136); *see Est. of Maurice v.*  
14 *Life Ins. Co. of N. Am.*, 792 Fed.Appx. 499, 500 (9th Cir. 2020) (reaffirming that “a  
15 preexisting condition can bar coverage even though the claimed injury was the  
16 predominant or proximate cause of the disability”). In other words, it is enough that  
17 Kim’s pre-existing depression, anxiety, and related conditions, or the treatment  
18 (Zyprexa) of those conditions, *substantially contributed* to his claimed disability,  
19 *even if COVID-19 could be shown to be the predominant or proximate cause of the*  
20 *disability (and it cannot be so shown).*

21 Application of the above test “requires a two-pronged analysis, namely: (1)  
22 whether there is a pre-existing disease, pre-disposition, or susceptibility to injury;  
23 and (2) whether this pre-existing condition, pre-disposition, or susceptibility  
24 substantially contributed to the disability or loss.” *McClure*, 84 F.3d at 1135 (citing  
25 *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1032 (4th Cir.1993) (en  
26 banc)). The Administrative Record establishes that: (1) Kim took prescribed  
27 medication during the “lookback period” for diagnosed, longstanding pre-existing  
28 conditions including depression, anxiety, and ADHD; and (2) Kim’s alleged



1 disability, which began within the first 12 months after the effective date of his  
2 coverage, was substantially contributed to by the same conditions (depression,  
3 anxiety, etc.) and/or by his treatment (Zyprexa) for those conditions. As such, the  
4 Plan's pre-existing condition exclusion bars coverage.

5 1. Kim Had an Extensive Pre-Existing History of Diagnosed  
6 Depression, Anxiety, and ADHD, for Which He Took  
7 Prescribed Medication During the "Lookback Period"

8 Kim admits that he suffered from depression, anxiety, and ADHD, and that  
9 these conditions pre-existed his coverage under the Plan. [Doc. #1, 3:25-27] In his  
10 July 7, 2021 interview with Guardian, Kim described a longstanding history of  
11 depression, anxiety, and ADHD. [AR 1971] This history is further supported by  
12 Kim's medical records, as detailed above. [See, e.g., AR 4480, 4964, 5093]

13 Kim also had a history of continuous use of Lexapro for his depression and  
14 anxiety and Adderall for his ADHD, and he continued taking these prescribed  
15 medications during the "lookback period" of February 1, 2020 to April 30, 2020.  
16 [AR 568, 2168-69, 4483] Specifically, office visit notes from Kim's November 18,  
17 2019 Kaiser visit indicate an active prescription of 100 Lexapro tablets (with one  
18 remaining refill). [AR 2168-69] Kim's medications were reviewed during his  
19 February 20, 2020 visit—within the "lookback period"—to his physical medicine  
20 doctor. [AR 4483] The notes from that visit reflect diagnoses of depression, anxiety,  
21 and ADD [sic], and indicate that Kim was taking one tablet of Lexapro 10 mg daily  
22 and Adderall 35 mg tablets at that time. [Id.]

23 2. Kim's Depression, Anxiety, and Related Conditions Continued  
24 to Worsen Leading Up to His Claimed Disability

25 Kim's depression, anxiety, and ADHD not only pre-existed his coverage, but  
26 also continued in the months preceding his COVID-19 diagnosis and his claimed  
27 disability. In September 2020, Kim asked his primary care physician, Dr. Mehrok,  
28 for a sleep study referral due to his ongoing insomnia. [AR 5189] He also emailed

1 Dr. Moldawsky (whom he had not seen since 2019) in November 2020 and stated  
2 that he “still struggle[d] with persistent depressive thoughts and feelings” and that  
3 his sleep was worsening. [AR 5194] Kim therefore asked Dr. Moldawsky to be  
4 referred for TMS treatment for his depression. [*Id.*] On September 23, 2020—*three*  
5 *and one-half months before he contracted COVID-19*—Kim reported to the  
6 emergency room for treatment of chest pain, a known physical symptom associated  
7 with panic attacks. [AR 3283] The ER physician noted *active diagnoses* including  
8 “persistent depressive disorder and generalized anxiety disorder,” and that Kim had  
9 reported “confusion, disorientation and difficulty forming words” earlier that day.  
10 [AR 3288, 5217] In his January 4, 2021 treatment session with Dr. Moldawsky—  
11 *still before his COVID-19 diagnosis*—Kim reported “recurring passive suicidal  
12 ideation” and “chronic depression.” [AR 2238]

13 3. Kim Was Prescribed Zyprexa in January 2021 to Treat  
14 Depression and Anxiety Symptoms; He Was Not Prescribed  
15 Zyprexa to Treat COVID-19 Symptoms

16 There is no evidence in the Administrative Record that Kim received any  
17 medication or other treatment for COVID-19 symptoms. On the contrary, the  
18 symptoms Kim experienced following his January 7, 2021 COVID-19 infection  
19 were the *same or similar symptoms* of depression and anxiety for which he had been  
20 treated previously. When Kim called Kaiser on January 19, 2021 (after his COVID-  
21 19 diagnosis), to complain of “severe panic attacks” and “suicidal thoughts,” he  
22 reported a *prior history of “anxiety and panic attacks.”* (Emphasis added.) [AR  
23 4898] That is, Kim was experiencing an increased level of the same symptoms he  
24 had experienced in the past. On the same date, Kim similarly reported to Dr.  
25 Moldawsky that he was experiencing the same symptoms he had experienced before  
26 his COVID-19 infection: intense anxiety, agitation, suicidal ideation, and poor sleep.  
27 [AR 4900]



1 Every medical professional who treated Kim or reviewed his medical records  
2 agrees that: (1) Kim was prescribed and took Zyprexa starting in January 2021 to  
3 treat symptoms of depression and anxiety (his pre-existing conditions); and (2)  
4 Kim’s tardive dyskinesia and tardive akathisia—his allegedly disabling  
5 conditions—were likely caused by Zyprexa. In short, there is no real question that  
6 Kim’s alleged disability was caused or, at a minimum “substantially contributed to,”  
7 by medical treatment of his pre-existing conditions.

8 Kim’s treating physicians confirmed that Kim was prescribed and took  
9 Zyprexa—an “antipsychotic drug” used to treat depression and anxiety [AR 3270,  
10 3274]—to treat his depression and anxiety symptoms. **Dr. Moldawsky** first  
11 prescribed Zyprexa on January 19, 2021, to treat Kim’s complaints of “intense  
12 anxiety, agitation, pacing, feelings of doom,” “thoughts of self-harm,” and poor  
13 sleep. [AR 4900-01] **Dr. Martinez**, who later wrote to Guardian on Kim’s behalf,  
14 agreed that Kim was treated with Zyprexa for these symptoms. [AR 3274] Kim’s  
15 second course of Zyprexa likewise was prescribed by Dr. Moldawsky in response to  
16 Kim’s report of a resurgence of “intense anxiety.” [AR 4928-29] When Kim saw  
17 **Dr. Robert Lee** in May 2021 for a second opinion, Kim himself stated that he had  
18 taken Zyprexa to treat his increased anxiety and agitation. [AR 2427] And  
19 Guardian’s peer reviewers similarly noted that Kim had been prescribed Zyprexa for  
20 his anxiety and related symptoms. [AR 5409 (**Dr. Lentnek**), 5415 (**Dr. Meytin**)]<sup>10</sup>

21 Kim’s treating physicians, who had opined that Kim was disabled due to  
22 tardive dyskinesia and tardive akathisia, also unanimously agreed that Zyprexa  
23 caused those allegedly disabling conditions. On March 25, 2021, **Dr. Neff** diagnosed  
24 Kim’s involuntary movements as tardive dyskinesia and tardive akathisia resulting  
25 from Zyprexa usage. [AR 1269-70] Dr. Neff reaffirmed in an April 13, 2021

26  
27 <sup>10</sup> Kim’s contention in his Complaint that “Plaintiff had suffered from a severely  
28 adverse reaction to the medications that he had taken *to treat his COVID-19*” [Doc.  
#1, 16:26-27 (emphasis added)] stands in sharp contrast to the medical records and  
finds no support from any medical professional.

1 progress note that Zyprexa had resulted in worsened compulsive thinking and  
2 akathisia with new orofacial and head movements. [AR 704] **Dr. Linda Soojin Lee**,  
3 with whom Kim treated in the emergency room on April 17, 2021, likewise asserted  
4 that Kim had developed drug-induced akathisia and cognitive impairment following  
5 his Zyprexa intake. [AR 3475]

6 In his June 18, 2021 APS, **Dr. Robert Lee** opined that Kim was disabled from  
7 working due to “neuroleptic [anti-psychotic medication] induced akathisia.” [AR  
8 1379] Dr. Lee’s October 26, 2021 letter to Guardian similarly stated that Kim’s  
9 “difficulties with movement, cognitive slowing” were “likely caused by a side effect  
10 to a trial of medication for mental health.” [AR 3270]<sup>11</sup> During a May 14, 2021  
11 visit, **Dr. Martinez** noted his agreement with the diagnoses of tardive dyskinesia and  
12 akathisia “secondary to Zyprexa use.” [AR 2600] In his October 25, 2021 letter to  
13 Guardian, Dr. Martinez reiterated his opinions that these conditions were “solely  
14 caused by the use of dopamine receptor-blocking agents, including the antipsychotic  
15 drug Zyprexa.” [AR 3274]

16 **Dr. Meytin**, the board-certified neurologist who reviewed Kim’s records at  
17 Guardian’s request, echoed Kim’s treating doctors’ opinion that Zyprexa caused  
18 Kim’s tardive dyskinesia and tardive akathisia. [AR 5415]

19 In sum, the Administrative Record amply demonstrates that Kim treated with  
20 Zyprexa for depression and anxiety, and that in turn Zyprexa caused the tardive  
21 dyskinesia and tardive akathisia that allegedly disabled Kim.

22 i. There is No Evidence That COVID-19 or Any Other Non-Pre-  
23 Existing Condition Caused Kim’s Claimed Disability

24 Kim’s claim is premised on the contention that he “suffered from a severely  
25 adverse reaction to the medications that he had taken to treat his COVID-19.” [Doc.  
26 #1, 16:26-27] But this theory is based solely on the say-so of Kim and his family

27  
28 <sup>11</sup> Dr. Lee’s May 4, 2021 note identifies Zyprexa as the drug that caused Kim’s  
akathisia. [AR 2427]

members. None of Kim’s medical providers have supported that theory. “Narratives provided by the claimant and any family and friends are properly accorded less weight than medical evidence in the record given their potential for bias and inability to diagnose medical conditions or assess functional capacity in the way individuals trained in the medical field can.” *Stratton v. Life Ins. Co. of N. Am.*, 589 F.Supp.3d 1145, 1175 (S.D. Cal. 2022) (citing *Shaw v. Life Ins. Co. of N. Am.*, 144 F.Supp.3d 1114, 1136 (C.D. Cal. 2015)). Indeed, courts have consistently held that a claimant’s self-reported statements concerning his own disability are not entitled to weight where they are not supported by objective medical evidence. *See, e.g., Hulbert v. Hartford Life & Acc. Ins. Co.*, 2021 WL 3291888, \*11 (N.D. Cal. 2021); *McCool v. Life Ins. Co. of N. Am.*, 2018 WL 6137163, \*5 (C.D. Cal. 2018); *Johnson v. Aetna Life Ins. Co.*, 2017 WL 6043086, \*6 (C.D. Cal. 2017), *aff’d*, 745 Fed.Appx. 35 (9th Cir. 2018); *Biggar v. Prudential Ins. Co. of Am.*, 274 F.Supp.3d 954, 968 (N.D. Cal. 2017); *Seleine v. Fluor Corp. Long-Term Disability Plan*, 598 F.Supp.2d 1090, 1101-02 (C.D. Cal. 2009), *aff’d* 409 Fed.Appx. 99 (9th Cir. 2010).

In contrast, Dr. Lentnek, the peer reviewer specializing in infectious disease, affirmatively rejected any such connection as lacking medical support. [AR 5409] As set forth more fully earlier, Dr. Lentnek commented that Kim’s COVID-19 course was light, normal, not complicated, and without any severe issues, and that Kim did not experience any shortness of breath or dyspnea and did not require hospitalization or any treatment specifically for COVID-19. [AR 5409] Dr. Lentnek went on to expressly reject Kim’s attribution of his disability to COVID-19:

Attending physicians noted that a psychiatric etiology to these cognitive issues was a more salient factor, but the claimant and his wife are convinced that these issues are due to COVID-19. Medical information does not provide verifiable evidence of this. The claimant’s COVID-19 course has been light and not complicated, and this does not correspond to sudden onset of severe issues two months

1 later. Medical information also notes improvement of the symptoms  
2 with use of psychiatric medications. Medical information does not  
3 otherwise support any functional impairment due to COVID-19 or due  
4 to any other infectious disease.

5 [AR 5409-10] The well-supported opinion of a peer reviewer is entitled to credit  
6 over the unsupported opinion of a treating physician, let alone the conclusory  
7 statements of a lay claimant or his family members. *Ibrahim v. Bayer Corp.*  
8 *Disability Plan*, 584 Fed.Appx. 743, 745 (9th Cir. 2014); *Biggar*, 274 F.Supp.3d at  
9 968; *Sanchez-Levine v. Metro. Life Ins. Co.*, 2017 WL 4286139, \*10 (C.D. Cal.  
10 2017); *Johnson*, 2017 WL 6043086 at \*6; *Shaw*, 144 F.Supp.3d at 1130.

11 4. It Is Sufficient That Kim’s Pre-Existing Condition Substantially  
12 Contributed to His Claimed Disability, Irrespective of Any  
13 Other Alleged Causes

14 The evidence discussed above unequivocally establishes that Kim’s  
15 depression and anxiety, and the medication he took to treat them, at a minimum  
16 “substantially contributed to the disability” he claims to have suffered. *See*  
17 *Wilkerson*, 303 Fed.Appx. at 409; *McClure*, 84 F.3d at 1136. For argument’s sake,  
18 however, even if any medical evidence existed of a connection between Kim’s  
19 alleged disability and any non-pre-existing condition, *this would not be enough to*  
20 *elude the Plan’s pre-existing condition exclusion*. That is because, under well-  
21 settled Ninth Circuit law, if a pre-existing condition substantially contributed to the  
22 claimed disability, “the insurer may deny benefits *even if a later condition is shown*  
23 *to be ‘the predominant or proximate cause of the disability.’”* *Id.*; *Est. of Maurice*,  
24 792 Fed.Appx. at 500.

25 In *Earle v. Unum Life Ins. Co. of Am.*, 2021 WL 4871785 (9th Cir. 2021), the  
26 Ninth Circuit affirmed the district court’s determination that the insurer had correctly  
27 denied benefits based on the conclusion that the claimant’s pre-existing  
28 vitreomacular traction (“VMT”) substantially contributed to her vision loss. *Id.* at

1 \*1. The court found that the claimant “could have developed a macular hole even  
2 without her ... fall, and conversely, that she would not have developed a macular  
3 hole without the preexisting VMT. *Id.* Here, the Administrative Record  
4 demonstrates that Kim could have developed tardive dyskinesia and tardive akathisia  
5 without his COVID-19 infection, and conversely, that Kim would not have  
6 developed tardive dyskinesia and tardive akathisia without his depression and  
7 anxiety. Indeed, without depression, anxiety, and their related symptoms, Kim  
8 would not have been prescribed Zyprexa, the medication that indisputably caused  
9 him to develop tardive dyskinesia and tardive akathisia.

10 In *Ekno v. Northwestern Mut. Life Ins. Co.*, 2008 WL 782728 (E.D. Cal.,  
11 2008), the claimant alleged disability due to depression, “for which she was treated  
12 and took medication for during the pre-existing condition exclusionary time period.”  
13 *Id.* at \*7. The court found that the pre-existing condition exclusion applied to  
14 preclude benefits:

15 The record contains substantial evidence demonstrating that Ekno  
16 currently suffers from severe depression and was treated and took  
17 prescription medicine for depression during the pre-existing condition  
18 exclusionary time period. The record also contains evidence, based on  
19 a medical evaluation by a psychiatrist, demonstrating that Ekno has a  
20 long history of recurrent depression that began when she was twenty-  
21 nine (approximately ten years before she stopped working for the Water  
22 Education Foundation), and has been prescribed various anti-  
23 depressants over that span to treat bouts of depression that occur  
24 approximately twice-a-year. Finally, while there is evidence in the  
25 record indicating that Ekno also suffers from the non-pre-existing  
26 condition of prolactinoma, the record contains substantial evidence  
27 supporting NWML’s conclusion that Ekno’s disability was caused or  
28 contributed to by depression.

1 *Id.*

2 As such, because Kim's pre-existing condition, and the use of Zyprexa to treat  
3 it, substantially contributed to his claimed disability, Guardian correctly concluded  
4 that the Plan's pre-existing condition exclusion precluded any LTD benefits.

5  
6 **IV. CONCLUSION**

7 Based on the foregoing, the Court should find, as did Guardian, that Kim's  
8 alleged disability was caused or substantially contributed to by a pre-existing  
9 condition, and accordingly that Kim is not entitled to LTD benefits under the Plan.  
10 The Court should enter judgment against in favor of Guardian and against Kim.

11  
12 Dated: March 4, 2024

MAYNARD NEXSEN LLP

13 By: /s/ Ophir Johna  
14 OPHIR JOHNA  
15 KAREN T. TSUI  
16 Attorneys for Defendant The Guardian Life  
17 Insurance Company of America  
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**CERTIFICATE OF COMPLIANCE WITH L.R. 11-6.1**

The undersigned, counsel of record for Defendant The Guardian Life Insurance Company of America, certifies that this brief contains 6,998 words (excluding the caption, any table of contents, any table of authorities, the signature block, this certification, and any indices and exhibits), which complies with the word limit of Local Rule 11-6.1.

Dated: March 4, 2024

MAYNARD NEXSEN LLP

By: /s/ Ophir Johna  
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Insurance Company of America

**CERTIFICATE OF SERVICE**

***Kim v. Guardian Life Insurance Company of America***

**Case No. 8:23-cv-01579-DOC-ADS**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am a citizen of the United States and employed in Los Angeles, California, at the office of a member of the bar of this Court at whose direction this service was made. I am over the age of 18 and not a party to the within actions; my business address is 10100 Santa Monica Blvd., Ste. 550, Los Angeles, CA 90067.

On **March 4, 2024**, I served the document(s) entitled, DEFENDANT'S OPENING TRIAL BRIEF, on the interested parties in this action by placing true copies thereof enclosed in a sealed envelope(s) addressed as stated below:

**SEE ATTACHED SERVICE LIST**

☒ **(BY CM/ECF SERVICE):** I caused such document(s) to be delivered electronically via CM/ECF as noted herein.

I declare under penalty of perjury under the laws of the United States that the above is true and correct and was executed on **March 4, 2024**. at Los Angeles, California.



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Lea Borys



**SERVICE LIST**

***Kim v. Guardian Life Insurance Company of America***

**Case No. 8:23-cv-01579-DOC-ADS**

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